Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

DRILTECH, INC., PETITIONER,

v.

REEDRILL CORPORATION, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does this Court's precedent in *Markman* require a court to interpret the meaning of a term used in a patent claim where a party asserts a meaning for the term that is inconsistent with the use of that term in the patent document itself?

II. Did the appellate court impermissibly ignore this Court's precedent in *Markman* by not interpreting a claim term and allowing the claim to be interpreted in a manner inconsistent with the patent document itself?

STATEMENT PURSUANT TO RULE 29.6

The only parties to this action are those listed in the caption. The parent companies and nonwholly owned subsidiaries of Driltech, Inc. that have issued shares to the public are:

Tamrock Corp. (formerly Tampella Corp.)
Sandvik Aktiebolag

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NO.

OCTOBER TERM, 1998

DRILTECH, INC., PETITIONER,

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REEDRILL CORPORATION, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Petitioner, Driltech, Inc., respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The judgment of the United States Court of Appeals for the Federal Circuit of August 5, 1998 (App., *infra*, 1a) is currently unreported. It is an affirmance under Fed. Cir. R. 36. The order of the United States District Court for the Eastern District of Texas of August 26, 1996 (App., *infra*, 2a-9a) is unreported. The order and final judgment of the

United States District Court for the Eastern District of Texas of April 30, 1997 (App., *infra*, 10a-15a & 16a-18a) are unreported. The order of the United States District Court for the Eastern District of Texas of August 19, 1997 (App., *infra*, 19a-20a) is unreported.

JURISDICTION

The judgment of the Federal Circuit was entered on August 5, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 35, United States Code, section 112 provides in pertinent part:

> The specification shall contain a written description of the invention, and of the manner and process of making and using it, in such full, clear, concise, and exact terms as to enable any person skilled in the art to which it pertains, or with which it is most nearly connected, to make and use the same, and shall set forth the best mode contemplated by the inventor of carrying out his invention.
>
> The specification shall conclude with one or more claims particularly pointing out and distinctly claiming the subject matter which the application regards as his invention.

Title 35, United States Code, section 271(a) provides:

> Except as otherwise provided in this title, whoever without authority makes, uses, offer to sell or sells any patented invention, within the United States or imports into the United States any patented invention during the term of the patent therefor, infringes the patent.

STATEMENT OF THE CASE

In the proceedings below, the respondent, Reedrill, Corp., charged that Driltech infringed U.S. Patent Nos. 4,128,135 and 4,194,419 (hereinafter the '135 and '419 patents, respectively). The patents relate to drilling rigs and particularly to a drill pipe handling mechanism used to manipulate lengths of drill pipe on portable rotary blasthole drilling rigs. The primary issues before the district court were whether certain drilling rigs and wrenches of Driltech infringed either or both patents and what, if any, damages should be awarded to Reedrill. A critical issue before the jury was whether the accused Driltech drilling rigs include a "movable gate" as that term is used in the '135 patent. The district court, without objection, allowed the jury to use the plain meaning of the word "gate" in reaching its verdict. The court provided no claim interpretation for the term "movable gate." The jury found infringement by Driltech and awarded damages. The damages were enhanced by the district court.

Driltech argued to the appellate court that claim interpretation, being purely a matter of law, required the court to review the interpretation of the term "movable

gate," and to adjudge that by properly interpreting the term "movable gate," *i.e.*, by interpreting the term in a manner consistent with the use of that term in the patent document itself, no reasonable jury could find infringement. Driltech also argued that Reedrill's witnesses used the term "movable gate" during testimony in a manner inconsistent with the use of the term in the '135 patent. Allowing an interpretation of a claim term that is inconsistent with the use of the term in the patent conflicts with both the precedent of this Court and the precedent of the Federal Circuit. Nonetheless, the appellate court declined to address the question and affirmed the judgment of the district court under Fed. Cir. R. 36.

I. The Technology At Issue

Portable rotary blasthole drilling equipment of the type at issue here, consists of a truck (or crawler) and the drilling rig itself, as shown on the following page.

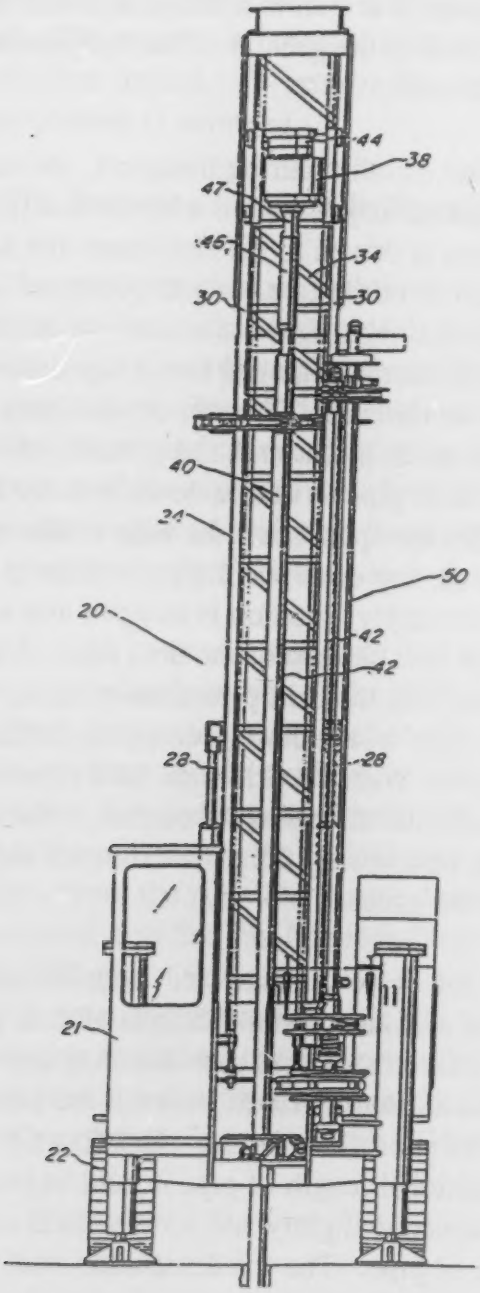

FIG 1

In use, the equipment is driven to a designated site and the desired hole is drilled in the ground. The equipment can be driven from site to site.

For ease and stability during transport, the mast or tower of the equipment is lowered to a horizontal position. After the equipment is driven to the site where the hole is to be drilled, the mast is raised to a vertical position. A first length of drill pipe having a drill bit at one end is connected via screw threads at its opposite end to the top drive assembly located on the mast. The top drive rotates and lowers as the drill bit drills through the ground. As the top drive lowers, the drill pipe advances down into the hole and the top of the drill pipe approaches the base of the mast assembly. When the top of the drill pipe is close to the base of the mast assembly, rotation is stopped and a holding wrench is attached near the top of the drill pipe. The holding wrench prevent the drill pipe from rotating and prevents the drill pipe from possibly dropping further into the just drilled hole. With the drill pipe held in position by the holding wrench, the direction of rotation of the top drive is reversed, unscrewing the drive from the top of the length of pipe in the ground.

After the top drive is unscrewed from the pipe, the top drive is raised and an additional length of drill pipe, typically from an associated drill pipe handling and storage mechanism, is moved into position between the raised top drive and the portion of the drill pipe extending up from the ground. The additional length of pipe is held in place and the top drive is lowered slightly and screws itself onto the additional length of pipe. The top drive/additional pipe combination is lowered onto the length of pipe already in

the hole. Mating screw threads connect the lengths of pipe together. The holding wrench is disengaged and drilling resumed. The process is repeated until a hole of the proper depth has been drilled. To remove the drill pipe from the hole, the process is reversed.

II. The Invention Claimed In The '135 Patent

The invention claimed includes, *inter alia*, mechanisms to secure the lengths of drill pipe in the storage mechanism regardless of the position of the mast and storage mechanism. The '135 patent describes a "movable gate" which opens and closes an opening that surrounds a circumference of the pipe and loosely holds the pipe. The gate prevents lengths of drill pipe from tipping out of the storage mechanism when the mast is in the vertical position.

The '135 patent further describes a "retainer" which prevents longitudinal ejection of the drill pipe. Longitudinal ejection is possible when the mast is in the horizontal position and the drilling rig is being driven to a new location. Any sudden deceleration or acceleration of the rig could result in lengths of drill pipe being ejected, javelin-like, from the rig. The patent describes the retainer as an elongated arm that can be moved into position directly above the drill pipe. When the mast is horizontal, should the drilling rig suddenly stop or start, the pipe will slide within the gate and strike the retainer. The retainer and gate are separately described, separately claimed, and refer to distinctly separate elements in the '135 patent.

III. Proceedings Below

Reedrill filed suit against Driltech charging infringement of claim 4 of the '135 and of claims 1 and 2 of the '419 patents. The '135 patent claims a drill pipe handling mechanism. The '419 patent claims a particular wrench used on drilling rigs. Reedrill moved for summary judgment of infringement of the '419 patent. Reedrill's motion was granted. A jury heard testimony regarding the invalidity of the '419 and '135 patents and the allegation of infringement of claim 4 of the '135 patent.

With regard to the '135 patent, Reedrill presented testimony in which its witnesses referred to the retainer in the accused Driltech devices as a "gate" and as having a "gated opening." The jury was instructed, without objection, to use the plain meaning of the claim terms in reaching its infringement determination. The jury found infringement. On appeal, the Federal Circuit declined to address the issue of interpreting a claim term in a manner inconsistent with the use of the term in the patent itself. The Federal Circuit affirmed the judgment of the district court under Fed. Cir. R. 36.

REASONS FOR GRANTING THE PETITION

I. Summary of Reasons for Granting the Petition

Allowing a jury to use "plain meaning" as a tool to interpret a claim term in a manner inconsistent with the patent conflicts, in two respects, with *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996) [hereinafter *Markman II*]. First, by instructing the jury to use a "plain meaning" for a term that has a limited meaning in the

patent, the court either relies on the jury to thoroughly review the patent and its prosecution history to ascertain the proper "plain meaning" interpretation to apply, or the court offers the jury the opportunity to interpret the term in a manner inconsistent with the patent and its prosecution history. Either way, this abrogates the court's responsibility to provide the jury with a claim interpretation. *Markman II*, 517 U.S. at 391. In the latter case, it also creates a conflict with *Markman II*'s requirement to interpret terms in a manner so as to comport with the patent as a whole. *Id.* at 389. Second, because the issue of claim interpretation is purely a matter of law, the appellate court must review the district court's claim interpretation *de novo* to determine if a proper claim interpretation was made.

II. Allowing Patent Claim Terms To Be Interpreted In A Manner Inconsistent With Their Use In the Patent Conflicts With The Precedent Of This Court And The Federal Circuit

Prior to reaching the question of infringement, claim terms must be properly interpreted. *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1454 (Fed. Cir. 1998). *Markman II* settled the question of whether the interpretation of claim terms is a question of fact for the jury or a matter of law for the judge. It is a matter of law for the judge. *Markman II*, 517 U.S. at 391. In interpreting claim language, "the standard construction rule [is] that a term can be defined only in a way that comports with the instrument as a whole." *Id.* at 389. "[T]he trial judge alone has the duty and responsibility to interpret the claims at issue." *Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 64 F.3d 1553, 1556 (Fed. Cir. 1995). Even where

a term used in a claim has an ordinary or plain meaning, it is improper to use such an ordinary meaning where that ordinary meaning is inconsistent with the use of the term in the patent itself. *Desper Prods., Inc. v. QSound Labs, Inc.*, ___ F.3d ___, ___, 48 U.S.P.Q.2d 1088, 1096 (Fed. Cir. 1998). As part of the appellate court's *de novo* review of the claim interpretation, the appellate court must determine if a reasonable jury could find infringement of the properly interpreted claim. *See Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995), *aff'd*, 517 U.S. 370 (1996) [hereinafter *Markman I*].

In the present case, the district court did not provide the jury with an interpretation of the claim term "movable gate" but instructed the jury to use "plain meaning" to interpret all of the terms of the claim in suit from the '135 patent.[1] "Plain meaning" can allow a jury to improperly apply to a word what might otherwise be a reasonable meaning, but where such an otherwise reasonable meaning is plainly inconsistent with the use of the word in the patent itself. "[A] common meaning, such as one expressed in a relevant dictionary, that flies in the face of the patent disclosure is undeserving of fealty." *Renishaw plc v. Marposs Societa' per Azioni*, ___ F.3d ___, ___, 48 U.S.P.Q.2d 1117, 1122 (Fed. Cir. 1998). "Thus, where there are several common meanings for a claim term, the patent disclosure serves to point away from the improper meanings and toward the proper meaning." *Id.*

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1 Claim 4 of the '135 patent, the only claim in suit, requires, *inter alia*, an "upper arm including a recess for receiving the upper end portion of a drill pipe section, a movable gate for opening and closing said recess, and power actuator means operable for opening and closing said gate."

In reviewing post-judgment motions, a court must properly interpret the claim and then determine if a reasonable jury could find infringement of the properly interpreted claim.

The term "movable gate" has a specific meaning in the context of the '135 patent. The meaning of the term is narrower than many ordinary meanings which might otherwise apply. Thus, the district and appellate courts were required to interpret the term to determine if a reasonable jury could find infringement. The courts' failure to interpret the claim term on review conflicts with the *Markman II* requirement to perform such an interpretation.

III. The Accused Products Lack A Gate, As That Term Is Properly Interpreted, And No Reasonable Jury Could Find Infringement Of The Properly Interpreted Claim

As shown in Fig. 4 of the '135 patent (reproduced on the following page), gate 96 opens and closes recess 100 formed in upper arm 92.

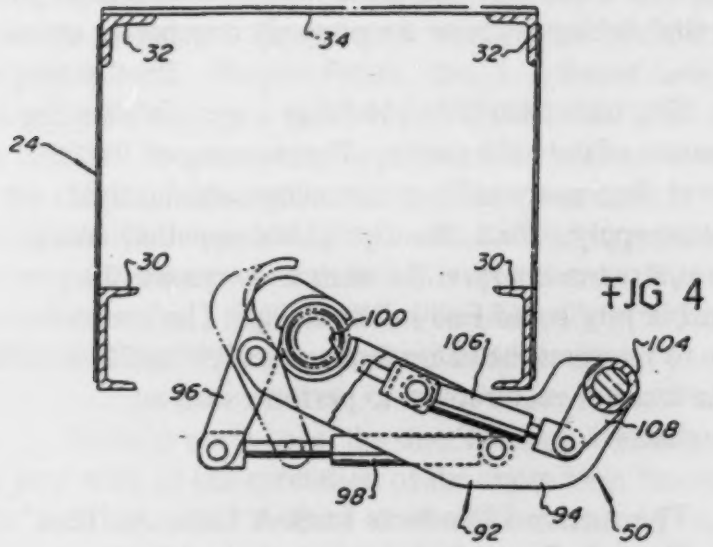

FIG 4

(Fig. 4 is a top view, *i.e.*, the drill pipe is perpendicular to the plane of this paper.) When gate 96 is pivoted closed, an enclosure consisting of recess 100 and gate 96 is closed around the upper end portion of the drill pipe to loosely hold the pipe. This prevents the drill pipe from tipping out of the storage mechanism when the mast is in the vertical position.

It is important to secure the drill pipe in the storage mechanism regardless of the position of the mast and mechanism. With the mast in the vertical position, the concern is that the pipe could tip out of the mechanism. Thus, the '135 patent describes and claims a movable gate. With the mast in the horizontal position and the rig in transit, the concern is that the pipe could be longitudinally ejected if the rig suddenly stops or starts. The '135 patent provides a second, separate and distinctly different element,

a retainer, to prevent the drill pipe from being longitudinally ejected when the mast is in the horizontal position. At trial, Reedrill referred to the retainer in the accused Driltech product as a gate. But having narrowly described a gate in obtaining its patent, the claim term must be interpreted to comport with the use of the term in the patent. *Markman II*, 517 U.S. at 389.

The Driltech product does not have a movable gate or its equivalent. Instead the Driltech product uses a special pipe, having an elongated upper flat section (made of two flat areas on opposite sides of the pipe) located near the top of the pipe, and a shorter, additional flat section (also made of two flat areas on opposite sides of the pipe) located at the bottom of the pipe to hold the pipe in the storage mechanism when in the vertical position (as shown on the following page).

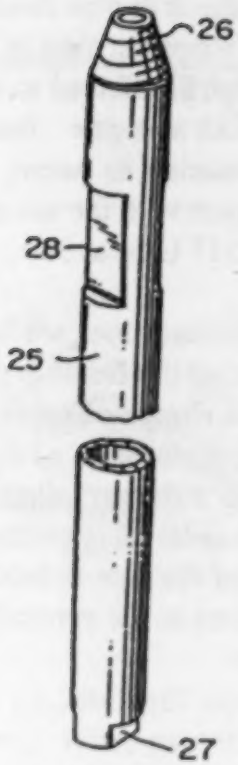

FIG. 9

To hold the pipe in the Driltech pipe storage mechanism, the top portion of the drill pipe is positioned in an opening having a fixed "C" shape, with the mouth of the "C" being wide enough to accept the elongated flat sections at the top of the drill pipe, but not as wide as the diameter of the drill pipe (as shown on the following page).

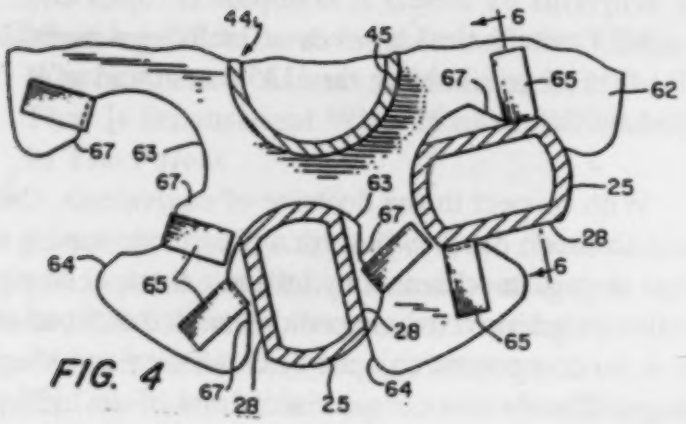

FIG. 4

When the pipe is inserted in the fixed "C" shaped opening, the pipe is turned slightly so that it can no longer tip out of the opening. The bottom portion of the pipe is then seated in a special fitting that is surrounded by a flange. This prevents the drill pipe from turning and tipping out of the pipe storage mechanism when it is in the vertical position (as shown below).

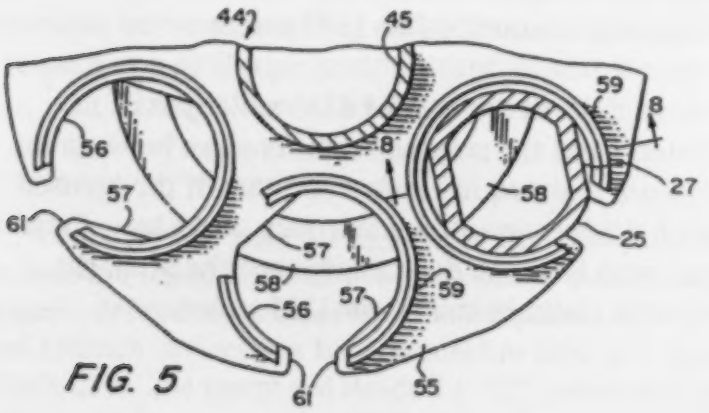

FIG. 5

No Driltech device needs or includes a movable gate, as that term is used in the '135 patent and as is required by the claim in suit.

With respect to the doctrine of equivalents, the accused Driltech devices prevent a pipe from tipping out of the pipe storage mechanism by utilizing the special pipe and specially designed, fixed-shaped openings described above. There is no component to open or close the fixed-shaped openings. The device claimed in claim 4 of the '135 patent, on the other hand, requires a gate to open and close the enclosure formed by the movable gate and the recess. It does not require special pipe.

The accused Driltech devices require the specially designed pipe to be carefully positioned and rotated to secure it or remove it from the storage mechanism. No such careful positioning is required of the mechanism claimed in claim 4. The upper end portion of the pipe need merely be placed in the recess and the gate closed. In sum, the Driltech mechanism prevents pipe from tipping out of the pipe handling mechanism in a substantially different way than that claimed in the '135 patent.

In light of the lack of a movable gate or its equivalent, and the substantial differences between the mechanism claimed in claim 4 and that of the accused Driltech devices, no reasonable jury could have found that any accused Driltech device infringed the properly interpreted claim in suit of the '135 patent.

IV. *Markman II* Requires A Court To Interpret The Meaning Of A Term Used In A Patent Claim Where A Party Asserts A Meaning For The Term That Is Inconsistent With The Use Of That Term In The Patent

Although it is clear from the above discussion that no accused Driltech device includes a movable gate or its equivalent, Reedrill asked the jury, to consider a retainer, *i.e.*, the element in the Driltech rig that prevents longitudinal ejection of a drill pipe, to be a movable gate.[2] But this asked too much. Reedrill's request requires that the separately described and separately claimed elements of a "gate" and a "retainer" be interpreted in a manner inconsistent with the use of those terms in the patent. The interpretation Reedrill urged is not suggested by the claims, the remainder of the patent document or the prosecution history of the patent at the U.S. Patent and Trademark Office. Indeed, such an interpretation contradicts the use of the term "gate" in the '135 patent.

Claim 1, a claim not in suit, includes the limitation of "a retainer mounted on said shaft above said upper arm and movable between retaining and nonretaining positions with respect to a drill pipe section stored in said storage rack . . . ." Thus, in the '135 patent, the term "retainer"

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2 United States Patent No. 3,913,754 (the '754 patent), a patent issued to Driltech almost two years before the filing of the '135 patent, defines as "retainer 96," the component of the accused Driltech devices that Reedrill seeks to label as a "gate." Both Driltech's '754 patent and Reedrill's '135 patent refer to the component that prevents longitudinal ejection of a drill pipe as a "retainer," not a gate.

refers to the element located above the drill pipe to prevent the drill pipe from sliding out when the storage mechanism is in the horizontal position. The term "movable gate," on the other hand, refers to the element located in the upper arm that prevents the drill pipe from tipping out when the storage mechanism is in the vertical position. In other words, the terms "retainer" and "movable gate" are separately defined, separately claimed, and refer to distinctly separate elements in the '135 patent. Nonetheless, Reedrill presented testimony in which its witnesses referred to the retainer in the accused Driltech devices as a "gate" and as having a "gated opening."

Reedrill cannot simply call a retainer a gate, and make it so. This is particularly true where, as in this case, such usage violates "the standard construction rule that a term can be defined only in a way that comports with the instrument as a whole." *Markman II*, 517 U.S. at 389; *Senmed, Inc. v. Richard-Allan Med. Indus., Inc.*, 888 F.2d 815, 819 n.8 (Fed. Cir. 1989).

Driltech should be entitled to rely upon the plain language of the '135 patent and the plain language of the '135 patent unambiguously distinguishes a "movable gate" from a "retainer." The jury, having applied a "plain meaning" to the term "movable gate" and found infringement, interpreted the claim term "movable gate" to mean the retainer in the Driltech rigs, even though such an interpretation is inconsistent with the use of that term in the patent itself.

Allowing the jury to use "plain meaning" as a tool to interpret a claim term in a manner inconsistent with the patent conflicts with *Markman II* in two respects. First, by

instructing the jury to use a "plain meaning" for a term that has a limited meaning in the patent, the court either relies on the jury to thoroughly review the patent and its prosecution history to ascertain the proper "plain meaning" interpretation to apply, or the court offers the jury the opportunity to interpret the term in a manner inconsistent with the patent and its prosecution history. Either way, this abrogates the court's responsibility to provide the jury with a claim interpretation. *Markman II*, 517 U.S. at 391. In the latter case, it also creates a conflict with *Markman II*'s requirement to interpret terms in a manner so as to comport with the patent as a whole. *Id.* at 389. Second, because the issue of claim interpretation is purely a matter of law, the appellate court must review the district court's claim interpretation *de novo* to determine if a proper claim interpretation was made. As discussed above, no reasonable jury could have found infringement of the '135 patent using the proper claim interpretation of the term "movable gate" and, had the appellate court properly interpreted the claim term "movable gate," as required under *Markman II*, it could not have affirmed the district court's judgment under Fed. Cir. R. 36.

CONCLUSION

Claim interpretation is a matter of law left exclusively to the court. Where a jury is instructed to use the "plain meaning" for a term that has a particular meaning in a patent, *Markman II* is violated. For all of the

above reasons, this petition for writ of certiorari should be granted.

Respectfully submitted,

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November 1998

APPENDIX

APPENDIX A

NOTE: Pursuant to Fed. Cir. R. 47.6, this disposition is not citable as precedent. It is a public record. The disposition will appear in tables published periodically.

United States Court of Appeals for the Federal Circuit

98-1018, -1019

REDRILL CORPORATION,
Plaintiff/Cross-Appellant,
v.
DRILTECH, INC.,
Defendant-Appellant.

Judgment

ON APPEAL from the United States District Court for the Eastern District of Texas

in CASE NO(S). 95-CV-189

This CAUSE having been heard and considered, it is

ORDERED and ADJUDGED:

Per Curiam (MICHEL, PLAGER and CLEVENGER, Circuit Judges):

AFFIRMED. See Fed. Cir. R. 36

ENTERED BY ORDER OF THE COURT

DATED AUG 05 1998 /s/ Jan Horbaly / BG

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

REEDRILL CORP.,	§	
Plaintiff,	§	
	§	
v.	§	4:95cv189
	§	
DRILTECH, INC.	§	
Defendant.	§	

ORDER

On this day came on for consideration Plaintiff's First Motion for Summary Judgment and Plaintiff's Second Motion for Summary Judgment, and after consideration of the motions, responses, replies, and surreplies, the Court is of the opinion that Plaintiff's First Motion for Summary Judgment should be granted and Plaintiff's Second Motion for Summary Judgment should be denied.

Introduction

This is a patent case. Plaintiff, Reedrill Corporation ("Reedrill"), claims that Defendant, Driltech Inc. ("Driltech"), makes and sells hydraulic breakout wrenches which infringe Claims 1 and 2 of Reedrill's U.S. Patent No. 4,194,419 (the "'419 patent") for a hydraulic power-

actuated breakout wrench for coupling and uncoupling drill pipe.[1]

Reedrill has brought two motions for partial summary judgment in this action. The first motion alleges that, after proper construction of the claims, the Court can find as a matter of law that Driltech's breakout wrenches infringe upon the '419 patent. The second motion attempts to point to an absence of evidence to support Driltech's patent invalidity defense. The Court will analyze each motion in turn.

Summary Judgment Standard

The granting of summary judgment is proper if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c). The trial court must resolve all reasonable doubts in favor of the party opposing the motion. *Casey Enterprises, Inc. v. American Hardware Mut. Ins. Co.*, 655 F.2d 598, 602 (5th Cir. 1981). The party seeking summary judgment carries the burden of demonstrating that there is no actual dispute as to any material fact in the case. This burden, however, does not require the moving party to produce evidence showing the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett*, 106 S.Ct. 2548, 2554 (1986). The moving party satisfies its burden by "pointing out to the district court . . . that there is an absence of evidence to support the nonmoving party's case." *Id.*

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[1] Plaintiff also claims that another Reedrill patent is being infringed, but is not currently seeking summary judgment as to that patent. *Plaintiff's First Motion*, p.1 n.1.

Once the moving party has satisfied its burden, the nonmovant must "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56 (e). If the nonmovant fails to set forth specific facts in support of allegations essential to that party's claim and on which that party will bear the burden of proof, then summary judgment is appropriate. *Celotex*, 106 S.Ct. at 2552-53. Even if the nonmovant brings forth evidence in support of its allegations, summary judgment will be appropriate "unless there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2511 (1986).

Discussion

I. Reedrill's First Motion for Summary Judgment

Reedrill argues that the Court as a matter of law should find that four separate styles of breakout wrenches made and sold by Driltech, identified by Driltech's reference group numbers 010125, 013512, 014935 and 019254, infringe claims 1 and 2 of the '419 Patent. Driltech responds that its wrenches do not contain one of the limitations of claim 1[2] of the '419 Patent. Driltech claims that its wrenches do not have "a means forming a connection between said first jaw and said arm for causing said first jaw to slide along said arm in a substantially arcuate path," which is contained in claim 1 of the '419 patent.

---

[2] Claim 2 is dependent upon Claim 1.

A. The Law of Patent Infringement

An analysis to determine patent infringement requires two separate steps. First, the court must construe the claims asserted to be infringed as a matter of law in order to establish their meaning and scope. *Markman v. Westview Instruments, Inc.*, 116 S. Ct. 1384, 1393 (1996). Second, the claims as construed by the court are compared to the allegedly infringing device or process. *Id.* When a plaintiff asserts "literal infringement," as Reedrill does in the instant case, "the accused device must contain every limitation of the asserted claim." *Maxwell v. J. Baker, Inc.*, 86 F.3d 1098, 1105 (Fed. Cir. 1996).[3]

B. Construction of Claims 1 and 2 of the '419 Patent

Claims 1 and 2 read as follows:

> 1. A power actuated breakout wrench adapted to be mounted on a drilling rig which includes a drill stem made up of one or more drill pipe sections, said breakout wrench including an arm mounted on said drill rig for pivotal movement into and out of a position for engaging a drill pipe section with said breakout wrench, a first jaw mounted on said arm for engaging a drill pipe section, a second jaw mounted on said first jaw and movable between a clamping and nonclamping position with respect to said drill pipe section, a first hydraulic cylinder actuator connected to said arm

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[3] Reedrill has not claimed infringement under the "doctrine of equivalents."

> and said first jaw, and means forming a connection between said first jaw and said arm for causing said first jaw to slide along said arm in a substantially arcuate path with respect to said arm in response to the actuation of said first cylinder actuator for rotating, with respect to said arm, a drill pipe section clamped by said first jaw and said second jaw.
>
> 2. The invention set forth in Claim 1 wherein: said second jaw is pivotally mounted on said first jaw and said breakout wrench includes a second hydraulic cylinder actuator connected to said first jaw and said second jaw for moving said second jaw between clamping and nonclamping positions with respect to a drill pipe section.

The parties do not dispute the construction of any part of claims 1 and 2 of the '419 patent except for the following limitation:

> [said breakout wrench including] . . . means forming a connection between said first jaw and said arm for causing said first jaw to slide along said arm in a substantially arcuate path with respect to said arm in response to the actuation of said first cylinder actuator for rotating, with respect to said arm, a drill pipe section clamped by said first jaw and said second jaw.

This language is not ambiguous, therefore, the Court has considered solely the intrinsic summary judgment evidence

in crafting a construction of the patent limitation. *See Vitronics Corp. v. Conceptronic, Inc.*, 1996 WL 420341 (Fed. Cir. July 25, 1996) (finding reversible error when the district court considered extrinsic evidence in the form of expert testimony which varied or contradicted the claim language). The Court construes this limitation of claims to include any connection of the arm to the first jaw by the use of circular pins inserted through arcuate slots in the plates of the arm that allows the first jaw to move with respect to the arm along a substantially arcuate path when power is applied through the first hydraulic cylinder actuator connected to said arm and said first jaw.

C. Comparing the Driltech Breakout Wrenches to Claims 1 and 2 of the '419 Patent

Driltech admits that its breakout wrenches do contain a connection between the first jaw and the arm. However, Driltech claims

> that connection does not cause the first jaw to slide along the arm in an arcuate path during the breaking action. Instead, the pins and slots forming the connection only allow the jaw to move with respect to the arm in an arcuate path. The actual motion of the jaws is "caused" by the fact that they are clamped around a drill pipe and pushed around that pipe's center by a hydraulic cylinder pushing against the rest of the drill rig. The jaws on a Driltech breakout wrench move in an arcuate path with respect to the arm not because of some jaw-arm connection causing

> that motion, but because that is the motion they would have regardless of whether the jaws were connected to the arm.

Defendant's Response, p.5 (record citations omitted). However, the means by which the first jaw is attached to the arm, i.e. the arcuate slots and pins assembly with a first hydraulic cylinder actuator connected to said arm and first jaw, in the Driltech breakout wrenches guides or allows the first jaw to slide along the arm in an arcuate path. This connection in this manner is part of the cause of the first jaw taking this arcuate path. In other words, but for the arcuate slotting in the plates of the arm, the jaw would not move in an arcuate path. Driltech's argument that the first jaw's motion is caused by the hydraulic cylinder is correct. However, while the hydraulic cylinder may be the means of propulsion which causes the movement of the first jaw, the slot and pins assembly directs the arcuate course of that motion. Therefore, just as the positioning of a ship's rudder and the propulsion of its engine combine to cause a certain course, the pins and slots assembly combines with the hydraulic cylinder to produce a substantially arcuate path of the first jaw with respect to the arm. The Court finds that there is no genuine issue of material fact as to whether Driltech's breakout wrenches infringe upon claims 1 and 2 of the Patent.

II. Reedrill's Second Motion for Summary Judgment

In its Second Motion for Partial Summary Judgment, Reedrill attempts to show there is no genuine issue of material fact as to Driltech's affirmative defenses of patent invalidity. Driltech has responded with summary judgment evidence which raises a material fact issue for

trial on the issues of anticipation and obviousness theories of patent invalidity.

Conclusion

For the reasons stated above, Plaintiff's First Motion for Summary Judgment should be granted and Plaintiff's Second Motion for Summary Judgment should be denied.

IT IS SO ORDERED.

Signed this 26th day of August, 1996.

/s/ Paul Brown
UNITED STATES DISTRICT JUDGE

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

REEDRILL CORP.,	§	
Plaintiff,	§	
	§	
v.	§	4:95cv189
	§	
DRILTECH, INC.	§	
Defendant.	§	

ORDER

On this day came on for consideration Plaintiff's Motion for Judgment, and the Court having considered the motion, Defendant's response, Plaintiff's reply and Defendant's surreply, is of the opinion that the motion should be granted in part and denied in part.

Reedrill Corp. ("Reedrill") sued Driltech, Inc. ("Driltech") for patent infringement, alleging that its '135 and '419 patents were being infringed by Driltech. All disputed issues of fact were submitted to a jury for determination, except the issue of attorney's fees, and on January 28, 1997, the jury returned its verdict which found that both patents were valid, both patents were infringed by Driltech, that such infringement was willful, and that Reedrill had been damaged from lost profits and lost royalties in the total amount of $10,130,934.

Reedrill now seeks a judgment for not only its actual damages, but for enhanced damages pursuant to 35 U.S.C. § 284, pre-judgment interest in the amount of $2,938,529, and attorney's fees pursuant to 35 U.S.C. § 285 in the amount of $323,803. Driltech contends that Reedrill is not entitled to enhanced damages under the facts of this case, that this is not an exceptional case within the meaning of 35 U.S.C. § 285 to support the recovery of attorney's fees, and that Reedrill should not recover pre-judgment interest or its costs.

Reedrill also requests the Court to find a 2% reasonable royalty as to the '419 patent because the jury did not award Reedrill a reasonable royalty for the infringement of the '419 patent. Driltech opposes the making of any such finding by the Court.

Enhanced Damages

Plaintiff argues that the damages determined by the jury should be enhanced by being increased by three times the amount found, pursuant to 35 U.S.C. § 284 because the jury found that the infringement of both patents was willful. This provision for increased damages is permissive, not mandatory. "The patent statute's provision for increased damages is permissive not mandatory: A court may increase the damages up to three times the amount found or assessed. A finding of willfulness, though a sufficient basis for awards of enhanced damages, does not compel such an award." *State Indus., Inc. v. Mor-Flo Indus., Inc.*, 948 F.2d 1573, 1576 (Fed. Cir. 1991) (emphasis and citations omitted).

In *Read Corp. v. Portec, Inc.*, 970 F.2d 816 (Fed. Cir. 1992) the court discusses a number of factors that may appropriately be considered by a Court in determining whether or not damages should be enhanced. The paramount consideration in deciding to grant enhancement is the egregiousness of the defendant's conduct based on all the facts and circumstances of the case. Other factors that may be considered are the defendant's size and financial condition, closeness of the case, duration of defendant's misconduct, remedial action by the defendant, defendant's motivation for harm and whether defendant attempted to conceal its misconduct, did the defendant have a reasonable basis for believing that it was not infringing, and the tactics of counsel. The Court has considered all these factors to the extent they are applicable to the facts of this case.

The evidence in this case clearly established that Driltech continued to manufacture and sell its infringing drilling rigs after receiving the notice letter from Reedrill in March 1995, after this lawsuit was filed in July 1995, and even after this Court's summary judgment of infringement of the '419 patent in August 1996. The evidence is undisputed that Driltech never sought opinion of patent counsel and it never offered any exculpatory opinion from any counsel that would serve as a basis for a good-faith belief that either patent was not infringed or was invalid. While the advice of patent counsel is not required to support a finding of a good-faith belief that a patent does not infringe, the fact that Driltech did not seek any such opinion and did not offer any exculpatory opinion from any counsel is evidence to be considered in this case. The question of the infringement of the '419 patent was not close at all. Driltech's breakout wrench and the patented wrench are virtually identical. Driltech argues that its

breakout wrench was independently designed and offered evidence that its designer did not know of the '419 patent at the time of the design of the Driltech wrench. Assuming this to be true, even though the evidence in the case supports a contrary inference, Driltech persisted in manufacturing and marketing its infringing drilling rigs after it received notice of the '419 patent. With respect to the '135 patent, the question is much closer concerning the infringement of the pipe storage rack and the pair of holding wrenches. The closeness of the question with respect to these two elements of claim 4 of the '135 patent mitigate against awarding damages in an amount three times the amount found by the jury. Furthermore, the Court finds nothing improper about the conduct of Driltech's counsel during this litigation that would justify an enhancement of the damages. Also, Driltech's financial condition mitigates to some extent against a tripling of the damages. On the other hand the persistent, willful and flagrant manufacture and marketing of the infringing drilling rigs after receipt of the demand letter, the filing of this suit, and particularly after the Court's entry of the summary judgment in this case finding that the '419 patent was infringed, justifies the enhancement of damages to some extent. After considering all of the applicable factors, the Court is persuaded that damages should be enhanced in this case by one times the total damages suffered by Plaintiff subsequent to the writing of the demand letter in March 1995, which amounts to the sum of $2,808,614.

Attorney's Fees

The Court is of the opinion that this case is an exceptional case within the meaning of 35 U.S.C. § 285 and that Reedrill should recover its attorney's fees. *See*

Kori Corp. v. Wilco Marsh Buggies and Draglines, 761 F.2d 649, 657 (Fed. Cir.) cert. denied, 106 S. Ct. 230 (1985). The issue of attorney's fees was bifurcated from the jury trial and was left for the Court to determine based upon affidavits to be submitted by the parties. Plaintiff has submitted the declaration of David H. Judson as to attorney's fees, which supports total attorney's fees in the amount of $323,803 as being the reasonable and necessary fees incurred in the prosecution of this case. Defendant has not submitted any evidence in opposition to the declaration of Mr. Judson.

Pre-Judgment Interest

In its motion Reedrill seeks pre-judgment interest in the amount of $2,938,529 calculated at a 10% interest rate. Driltech contends that no award of pre-judgment interest should be made, but if an award is made, interest should be calculated at the prime rate and should be calculated in accordance with the declaration of its expert James Nawrocki. Pre-judgment interest should ordinarily be awarded a prevailing plaintiff in a patent infringement case. *General Motors Corp. v. Devex Corp.*, 103 S.Ct. 2058 (1983). Reedrill should recover pre-judgment interest as calculated by Reedrill. The calculation of interest submitted by Reedrill is a reasonable calculation and Reedrill should recover pre-judgment interest in this amount.

Royalty for the '419 Patent

The Court will decline to make an award of reasonable royalty for the '419 patent which would, in effect, set aside the jury's finding of zero royalty.

CONCLUSION

Judgment will be entered in accordance with this Order.

IT IS SO ORDERED.

Signed this 30th day of April, 1997.

/s/ Paul Brown
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

REEDRILL CORPORATION	§	
	§	
Plaintiff,	§	
	§	
vs.	§	CIVIL ACTION
	§	NO. 4: 95cv189
	§	
DRILTECH, INC.	§	
	§	
Defendant.	§	
	§	

FINAL JUDGMENT

The Court, having had the above matter come before the Court for trial, hereby enters this Final Judgment as follows:

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. Plaintiff Reedrill Corp. ("Reedrill") is the owner of United States Patents No. 4,128,135 and 4,194,419. Reedrill acquired these patents by assignment and also acquired by assignment the right to sue for past claims.

2. Defendant Driltech, Inc. ("Driltech") has infringed the '419 and '135 Patents through the sale of its rotary blasthole drilling rigs.

3. The Court finds that the '419 and '135 Patents are not invalid.

4. Reedrill has suffered injury as the result of Driltech's infringement. The Court hereby awards Reedrill lost profits from sales in the amount of $ 5,829,776. The Court also awards Reedrill a reasonable royalty in the amount of $4,301,158 for infringing sales by Driltech not included in the lost profits award. Thus, the total amount of actual damages (lost profits plus reasonable royalty) awarded to Reedrill is $10,130,934.

5. Driltech's infringement of both the '419 and '135 Patents was willful. Pursuant to 35 U.S.C. § 285, the Court hereby awards Reedrill enhanced damages in the amount of $2,808,614.

6. The Court hereby awards prejudgment interest to Reedrill in the amount of $2,938,529.

7. The Court finds this is an exceptional case under 35 U.S.C. § 285, and hereby awards Reedrill its attorneys fees in the amount of $323,803.

8. Pursuant to 28 U.S.C. § 1961, Reedrill shall recover from Driltech post-judgment interest after the date of judgment at the rate set by law.

9. Pursuant to 28 U.S.C. § 284, Reedrill shall recover its costs of suit from Driltech.

10. Any relief requested by any party that is not expressly granted herein is hereby denied. Let all writs and execution issue that may be necessary to enforce this judgment.

SIGNED this 30th day of April, 1996 [sic. 1997].

/s/ Paul Brown
UNITED STATES DISTRICT JUDGE

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

REEDRILL CORP.,	§	
Plaintiff,	§	
	§	
v.	§	4:95cv189
	§	
DRILTECH, INC.	§	
Defendant.	§	

ORDER

On this day came on for consideration Defendant Driltech, Inc.'s Motion for Judgment as a Matter of Law and For New Trial, and after consideration of the motion, response, reply and sur-reply, the Court is of the opinion that the motion should be denied.

The Court finds that the motion should be denied for the reasons contained within Plaintiff's briefing. Further, the Court notes for the record that it created several draft versions of the charge and had multiple charge conferences with both attorneys present. At each stage of the process, the Court entertained informal objections and suggestions to improve the charge. In fact, Driltech filed written objections to the final proposed charge immediately before the submission of the charge to the jury. All objections not contained within the written objections or made on the

record during the formal objections stage were not properly submitted to the Court for the purpose of preserving error.

Counsel cannot bury a proposed jury instruction in instructions submitted to the Court well in advance of trial and then sit silent until after a verdict is rendered. A Court is entitled to receive proposed jury instructions in an attempt to craft a fair charge in a collegial environment without the danger of a hidden error being planted in an early requested jury instruction and never reurged when the charge begins to take shape. Simply put, Defendant's complaints about the jury charge, aside from lacking merit, were not presented "in such a manner that the judge could act upon the objection." *Fischer v. Dallas Fed. Savs. & Loan Ass'n*, 855 F. 2d 567, 569 (5th Cir. 1988); Fed. R. Civ. P. 51.

Defendant Driltech, Inc.'s Motion for Judgment as a Matter of Law and For New Trial should be denied.

IT IS SO ORDERED.

Signed this 19th day of August, 1997.

/s/ Paul Brown
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
NOV 25 1998
CLERK

(2)

NO. 98-728

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

DRILTECH, INC.,

PETITIONER,

v.

REEDRILL CORPORATION,

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Does this Court's decision in *Markman* require a district court to limit a term in a patent more narrowly than its plain meaning when the Petitioner stipulated before the district court that the plain meaning should control?

II. Did the Federal Circuit properly reject Petitioner's assignment of error to a jury instruction that Petitioner requested and that the district court gave to the jury without objection?

STATEMENT PURSUANT TO RULE 29.6

The only parties to this action are those listed in the caption. The parent companies and nonwholly owned subsidiaries of Reedrill Corporation that have issued shares to the public are:

Svedala, Inc.

The following entity has an interest in the outcome of this case:

Reedrill Enterprises, Inc.

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STATUTES

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I. STATEMENT OF THE CASE

A. Summary Of Opposition

Petitioner Driltech, Inc. (Defendant below) seeks to challenge a patent claim construction that it requested from the district court, and that the district court gave to the jury. At trial, Petitioner urged the district court to instruct the jury to give the words in the claim their plain meaning. Despite the fact that Petitioner never objected to, and in fact invited this claim construction, Petitioner now contends that the district court committed reversible error by giving the "plain meaning" instruction. Unsurprisingly, the Federal Circuit affirmed the judgment of infringement without opinion.

Petitioner argues that "[w]here a jury is instructed to use the 'plain meaning' for a term that has a particular meaning in a patent, *Markman II* is violated." If the Court were to grant *certiorari* in this case, it would never reach the issue of claim interpretation, because Petitioner invited the trial court to give a "plain meaning" jury instruction and repeatedly waived its objections to that instruction. *Markman* did not overrule the long-standing law of invited error, change the procedure to preserve objections to a jury charge, or repeal the command in Fed. R. Civ. P. 51 that "[n]o party may assign as error the giving or failure to give an instruction unless that party objects thereto."

This case does not present issues worthy of review by *certiorari*. Neither the district court nor the Federal Circuit issued a published, precedential opinion in this case. There is no conflict between circuits. The answer to the question presented here -- whether a private litigant waives its objection to a jury instruction on claim interpretation by inviting the district court to give that very instruction -- is a foregone conclusion that does not warrant *certiorari*.

B. Proceedings Below

Respondent, Reedrill Corporation, manufactures rotary blasthole drilling rigs. Reedrill is the owner of United States Patents 4,128,135 and 4,194,419 (the '135 and '419 Patents) that cover rotary blasthole drilling technology. The '135 Patent discloses and claims a combination drill pipe handling and storage apparatus comprising three elements: a pipe storage rack, a pair of pipe holding wrenches, and a hydraulically operated breakout wrench. The '419 Patent covers just the hydraulically operated breakout wrench.

Reedrill sued Driltech for infringement of the '135 and '419 patents in the United States District Court for the Eastern District of Texas. The district court entered a partial summary judgment holding that Driltech's rotary blasthole drills infringed the '419 patent. The parties proceeded to a jury trial on the issues of 1) infringement of the '135 patent, 2) willfulness, 3) Driltech's defenses (validity of the patents and laches), and 4) damages.

Before trial, Driltech submitted a Brief on Interpretation in which it unequivocally told the district court that the "plain meaning" of the claim language should control. Driltech further told the district court that it did not need to conduct a *Markman* hearing to consider whether the claims of the patent should be interpreted differently than their plain meaning. Driltech made the following statements to the district court:

- "No *Markman* hearing is required."
- "Defendants [sic] agree that the '135 patent can be interpreted from the language of the patent itself with some reference to ordinary usage as described in a dictionary."

- "Since the plaintiff and defendant agree that the 'plain language' of the patent is sufficient, the Court need not conduct any *Markman* hearing to consider extrinsic evidence."[1]

During the course of fashioning the jury charge, the district court held numerous charge conferences with counsel before issuing its final draft of the charge.[2] During a colloquy regarding how Reedrill's Rule 50 motion would affect the jury charge, Driltech's lawyer told the district court that:

> With respect to the . . . moveable gate, it seems to me that based on all of the testimony, that's an issue for the jury. They may decide or not decide what the -- what the plain meaning of those words are.[3]

Driltech filed written objections after the district court issued its final draft of the charge. Nowhere in these objections did Driltech mention the plain meaning instruction about which it now complains.[4] The district court also received oral objections to the charge after reading it to the jury. Driltech did not orally object to the district court's plain meaning instruction either.[5]

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1 These statements appear in the appellate record at A01216.

2 Appendix E to Petitioner's Brief.

3 Trial Transcript at 1079.

4 Appendix E to Petitioner's Brief.

5 Trial Transcript at 1208.

After a five-day trial, the jury returned a verdict 1) that Driltech's rotary blasthole rigs infringed the '135 patent, 2) that Driltech's infringement of both patents was willful, 3) rejecting Driltech's defenses of invalidity and laches, and 4) awarding actual damages of $10,130,934 for infringement of both the '135 and '419 patents.

The district court entered judgment of infringement against Driltech. The district court further found that Driltech's willful infringement warranted enhanced damages in the amount of $2,938,529. The district court also held that this was an exceptional case pursuant to 35 U.S.C. § 285 and awarded Reedrill its attorneys' fees.

After the trial court entered judgment, Driltech moved for judgment as a matter of law and, in the alternative, a new trial. Driltech alleged that the trial court erred when it instructed the jury that it should give the term "gate," as used in the patent claims, its plain and ordinary meaning. The trial court held that Petitioner had waived any objections[6] to its jury instructions on claim interpretation:

> [The Court] created several draft versions of the charge and had multiple charge conferences with both attorneys present. At each stage of the process, the

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6 Driltech did submit proposed definitions of a number of claim terms in its draft jury charge submitted months before trial in the Joint Pretrial Order. Driltech, however, never referred to or drew the district court's attention to these definitions, which were part of a large stack of pretrial materials. The district court, in denying Driltech's motion for a new trial, held that these proposed jury instructions submitted with the Joint Pretrial Order did not preserve Driltech's objections. "Counsel cannot bury a proposed jury instruction in instructions submitted to the Court well in advance of trial and then sit silent until after a verdict is rendered." Appendix E to Petitioner's Brief.

> Court entertained informal objections and suggestions to improve the charge. In fact, [Petitioner] filed written objections to the final proposed charge immediately before the submission to the jury. All objections not contained within the written objections or made on the record during the formal objections stage were not properly submitted to the Court for the purpose of preserving error.
>
> * * *
>
> Simply put, Defendant's complaints about the jury charge, aside from lacking merit, were not presented 'in such a manner that the judge could act upon the objection.' *Fischer v. Dallas Fed. Sav. & Loan Ass'n*, 835 F.2d 567, 569 (5th Cir. 1988); FED. R. CIV. P. 51.[7]

Petitioner appealed the judgment of infringement to the United States Court of Appeals for the Federal Circuit. On appeal, Petitioner did not assign error to the "plain meaning" jury instruction, arguing instead that the evidence

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[7] Appendix E to Petitioner's Brief. The district court's holding was in accord with Rule 51, which requires a party to inform the trial judge of deficiencies in the charge in such a manner that the judge can act upon the objection. *McDaniel v. Anheuser-Busch, Inc.*, 987 F.2d 298, 306 (5th Cir. 1993) (citing *Fischer v. Dallas Fed. Sav. & Loan Ass'n.*, 835 F.2d 567, 569-70 (5th Cir. 1988). "[A] pretrial request for instructions or interrogatories is ordinarily insufficient to preserve error; theories of liability and defense frequently change during the course of a trial, and a trial judge will seldom make a final decision regarding the charge until the evidence is complete." *Id.* For this reason, the Fifth Circuit has held that the mere submission of a proposed jury instruction is not sufficiently specific to satisfy Rule 51. *Kelly v. Boeing Petroleum Servs., Inc.*, 61 F.3d 350, 361 (5th Cir. 1995).

was insufficient to prove infringement.[8] The Federal Circuit held oral argument on August 4, 1998, and affirmed without opinion on August 5, 1998, one day after oral argument.

II. REASONS FOR DENYING THE WRIT

A. The Federal Circuit Did Not Issue A Published Opinion

This case was decided below on the basis of Driltech's waiver of objections to the jury charge, which incorporated the "plain meaning" claim construction. The Federal Circuit thought so little of the precedential aspects of this case that it affirmed without opinion one day after oral argument. Nor did the district court issue a published opinion in this case.

Because there is no published precedent of any kind related to this case, accepting *certiorari* will not resolve any conflict of published opinions or rectify a published opinion that misstates the law.

B. Because Of Driltech's Waivers, The Court Will Not Even Reach The Merits of the Issue Advocated By Driltech

Driltech argues that because the district court "instructed the jury to use a 'plain meaning' for a term that [according to Driltech] has a limited meaning in the patent," the district court violated this Court's requirement in *Markman* that the district court interpret claim terms for the jury.[9] This is simply wrong. A "plain meaning"

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[8] This Court will refuse to consider arguments that were not presented to the courts below. *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 362 (1981).

[9] Petitioner's Brief at 19.

construction *is* a claim construction, just not the restrictive one Driltech now wants.

Even if the Court were inclined to grant *certiorari* to address this question, the Court would not reach it because Driltech failed to preserve it. In fact, *Driltech repeatedly urged the district court to use the plain meaning of the claim terms*. Because Driltech actively invited the actions that it now asserts constitute error, there is no arguable basis for the Court to exercise discretionary review.

C. Driltech Advocates Requiring District Courts To Make *Sua Sponte* Markman Rulings; This Is An Unworkable Precedent

Markman provides that district court interpretations of claim terms are reviewed *de novo*. Driltech argues that the district court has a duty to interpret claim terms. In this case, the district court did make a *Markman* ruling: it held the plain meaning of "gate" should control. Driltech is notably silent on what a litigant must do to obtain an interpretation of a claim term that differs from the plain meaning.

Clearly, a litigant cannot sit idle at trial, fail to request a *Markman* ruling on a claim term, then argue on appeal that the district erred by failing to make a *Markman* ruling *sua sponte* as to that claim term. Driltech admits its waiver in its Petition: "[t]he district court, *without objection*, allowed the jury to use the plain meaning of the word 'gate' in reaching its verdict." Petition at 3 (emphasis added). Driltech's posture is *even worse than it admits*: it actually urged the "plain meaning" *Markman* ruling that it now condemns!

Our adversary system of jurisprudence places a duty on the litigants to make requests and lodge objections at the

trial level to preserve arguments on appeal. It is not an onerous burden to require a litigant to timely and properly draw the district court's attention to issues upon which it desires a ruling. The law of waiver regarding jury instructions, Rule 50 motions, and evidentiary objections is well established and critical to the functioning of our adversarial system. Nothing in this Court's jurisprudence even implies that *Markman* rulings should be treated differently.

Modern patent litigation typically involves multiple patents, each with multiple claims. Hundreds, even thousands, of terms can be present in those claims. Any given term can harbor a crucial limitation that can be dispositive of infringement. *Markman* hearings often involve days of testimony from experts and detailed analysis of lengthy prosecution histories to ascribe meaning to one particular term. It would be virtually impossible for the district court to give special definitions for every word in every claim asserted in a patent case. That is why parties must guide the district court's attention to rule upon the meaning of claim terms they consider dispositive.

It must be incumbent upon the parties to identify the disputed terms, to request a *Markman* hearing, and to present proposed definitions. Most importantly, it is incumbent upon the parties to alert the district court to asserted errors in claim construction *before the case is submitted to the jury* so that the district court may consider and have the opportunity to cure any alleged errors in the claim construction. Driltech did none of these things.

In the world that Driltech posits, the parties have none of the above duties. In Driltech's world, a litigant can advocate one meaning at trial and a different meaning on appeal. If this were the law, a litigant would have an

incentive to advocate an erroneous interpretation of a few of the hundreds of claim terms to build in some grounds for automatic reversal. Trial judges across the nation would be forced to undertake the daunting task of *sua sponte* defining every term in a claim for fear of a baited appellate reversal. This Court should reject Driltech's attempt to elevate its flawed world view into procedural law.

D. Driltech's Attempt To Read Limitations From The Specification Into The Term "Gate" Violates Long-Standing Rules Of Claim Construction

Notwithstanding Driltech's waiver, it is clear that *Markman* does not require any further interpretation of "gate" beyond its plain and ordinary meaning. The plain and ordinary meaning of "gate" is a structure that "opens and closes a recess." Driltech now advocates appending two additional limitations on the term "gate:" 1) that the gate be pivotally attached to the upper arm of the storage rack, and 2) that the gate open and close the recess only when the mast is in a vertical orientation. Neither limitation appears in the claim language, and as will be seen, incorporating these limitations would run afoul of long-standing canons of patent claim construction.

It is a basic tenet of patent law that the language of the claims, not the specification, defines the scope of what the patent covers.[10] It is equally well established that words in a claim should "be given their ordinary and accustomed meaning, unless it appears that the inventor used them differently."[11] If the ordinary meaning of the claim language

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10 *SRI Int'l v. Matushita Elec. Corp.*, 775 F.2d 1107, 1118-19 (Fed. Cir. 1985)*(en banc)*

11 *Envirotech Corp. v. Al George, Inc.*, 730 F.2d 753, 759 (Fed. Cir. 1984).

reads on the accused device (as is the case here), the Court should not limit the claim by reference to the specification.[12] In this case, even if Driltech had not agreed that the plain meaning of the claim terms controlled, the district court still would have been correct to instruct the jury as to the plain meaning of those terms.

The Federal Circuit has, in other cases, condemned the same position that Driltech now advocates. "We have previously stated that '[w]hile . . . claims are to be interpreted in light of the specification and with a view to ascertaining the invention, it does not follow that limitations from the specification may be read into the claims.'"[13] Although the specification may aid the court in interpreting the meaning of disputed claim language, "particular embodiments and examples appearing in the specification will not generally be read into the claims."[14]

The element at issue from Claim 4 of the '135 Patent reads as follows:

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12 *SRI*, 775 F.2d at 119.

13 *Sjolund v. Musland*, 847 F.2d 1573, 1581 (Fed. Cir. 1988); *see Texas Instruments, Inc. v. United States Int'l Trade Comm'n*, 805 F.2d 1558, 1563 (Fed. Cir. 1986)("This court has cautioned against limiting the claimed invention to preferred embodiments or specific examples in the specification.").

14 *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1571, (Fed. Cir.), *cert. denied*, 488 U.S. 892 (1988) (internal citation omitted); *see Laitram Corp. v. Cambridge Wire Cloth Co.*, 863 F.2d 855, 865 (Fed. Cir. 1988), *cert. denied*, 490 U.S. 1068 (1989) ("References to a preferred embodiment, such as those often present in a specification, are not claim limitations.").

> a storage rack for storing at least one elongated drill pipe section, said storage rack including a lower arm including a receptacle for holding the lower end of a drill pipe section, an upper arm spaced apart from said lower arm, said upper arm including a recess for receiving the upper end portion of a drill pipe section, a movable gate for opening and closing said recess, and power actuator means operable for opening and closing said gate.

The *only* limitation on the term gate expressed in the claim is that the gate must be movable to open and close the recess. The claim is not functionally limited to opening and closing the recess in a particular direction. There is no requirement that the gate be attached to any particular portion of the storage rack. Nor is there any limitation as to whether the mast that holds the storage rack must be vertical or horizontal when the gate closes the recess.

Driltech tries to limit the term gate to a structure that opens and closes the recess when the mast is in a vertical position. Driltech further tries to limit the term gate by requiring that it be attached to the first arm. The claim language does not require either of these limitations, and to limit the term gate in this way would violate the canons of claim construction discussed above.

In a vain attempt to bolster its argument, Driltech points to another structure in the preferred embodiment called "a retainer." Driltech notes that the "retainer" closes the recess when the mast is horizontal and argues that any structure that performs this function cannot be a "gate" because the preferred embodiment of a "gate" closes the recess when the mast is vertical. But, Driltech ignores the portion of specification that identifies the structure Driltech calls the "gate" as a "*retaining gate.*" Thus, the '135 patent

specifies that a gate and retainer perform the same function -- to hold or "retain" a pipe in the recess in one or more directions. Driltech's attempt to differentiate a gate from a retainer is contradicted by the specification, which treats these structures interchangeably.

At trial, Reedrill proved that the Driltech devices contain a structure (that Driltech terms a "latch plate") that moves relative to the storage rack and functions to open and close the recesses in the storage rack. This structure corresponds to the "gate" in Claim 4 of the '135 patent, as it functions to open and close recesses in the upper arm of the storage rack. Reedrill presented persuasive evidence from which the jury could have reasonably concluded that the '135 patent was infringed. All of these technical arguments were raised before and soundly rejected by the Federal Circuit, which found them so unpersuasive that it affirmed the judgment of infringement one day after oral argument.

III. CONCLUSION

The decision below rested on a "plain meaning" claim construction that Driltech urged and the district court accepted. Just as Driltech cannot assign error to a course of action it invited, this Court should not grant *certiorari* to confirm the long standing legal proposition that one must object at the district court level to preserve the objection for appeal. The Court should deny the writ for these reasons.

November 25, 1998

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No. 98-728

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1998

DRILTECH, INC., PETITIONER,

v.

REEDRILL CORPORATION, RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

REPLY TO OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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SUMMARY OF THE REPLY

This brief addresses the two principal misstatements in Reedrill's opposition brief. First, there is no procedural bar to this Court's addressing the issue of claim interpretation as part of its review of the district court's denial of Driltech's motion for judgment as a matter of law. Second, this Court has granted certiorari where, as in this

case, the Federal Circuit has affirmed a district court under Fed. Cir. R. 36.

I. Reedrill Misstates the Procedural Posture of This Case - Review of the Claim Interpretation is Under the *De Novo* Standard

Contrary to the unsupported assertions made in the opposition brief, if the Court grants the pending petition, the Court would reach the issue of claim interpretation. Moreover, interpretation of the disputed claim term is under the *de novo* standard of review.

At trial, Driltech properly and timely made a motion for judgment as a matter of law under Fed. R. Civ. P. 50(a) that no reasonable jury could find infringement of U.S. Patent No. 4,128,135 (the '135 patent). The motion was properly renewed under Fed. R. Civ. P. 50(b). In reviewing a district court's ruling on a motion for judgment as a matter of law, the Federal Circuit applies the judgment as a matter of law standard anew. *Read Corp. v. Portec, Inc.*, 970 F.2d 816, 821 (Fed. Cir. 1992). The standard is whether a reasonable jury could have found infringement of the '135 patent. *See* Fed. R. Civ. P. 50.

To determine if a reasonable jury could have found infringement, the two-step infringement determination process must be undertaken. *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1454 (Fed. Cir. 1998). "[T]he court has the power and obligation to construe as a matter of law the meaning of language used in the patent claim." *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979 (Fed. Cir. 1995), *aff'd*, 517 U.S. 370 (1996) [hereinafter *Markman I*]. The construction given the claims is reviewed

de novo. *Id.* "The second step in an infringement analysis is determining whether a particular device infringes a properly construed claim . . . ." *Wright Med. Tech., Inc. v. Osteonics Corp.*, 122 F.3d 1440, 1443 (Fed. Cir. 1997). Therefore, in reviewing the denial of Driltech's motion for judgment as a matter of law, the claim must first be properly interpreted and that interpretation applied to the accused devices.

Moreover, regardless of whether there was an objection to the jury instruction, Fed. R. Civ. P. 51 does not prevent normal appellate review in light of the motion for judgment as a matter of law. *K & T Enters., Inc. v. Zurich Ins. Co.*, 97 F.3d 171, 174-75 (6th Cir. 1996) (citing *City of St. Louis v. Praprotnik*, 485 U.S. 112, 118-20 (1988)). For both of the above reasons, if the petition is granted, the Court can and should address the question of the proper claim interpretation for the '135 patent.

In its opposition, Reedrill takes out of context several statements made by Driltech to the district court. Driltech stated at trial, as it has throughout this matter, that "the [district court] need not conduct any 'Markman' hearing *to consider extrinsic evidence*." App. Record at A01216 (emphasis added).[1]

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[1] At Appellate Record A01215-26 is the brief filed by Driltech in support of its motion in limine to preclude Reedrill's expert witness from giving the jury his claim interpretation. Driltech argued that the expert's claim interpretation amounted to impermissible extrinsic evidence of the meaning of the claim terms in dispute, *e.g.*, the disputed term "movable gate." Driltech argued that "[i]t is

(continued...)

Reedrill raises a strawman when it argues, without citation, that Driltech's proposed claim interpretation requires adding structural elements from the specification into the claim. Opposition at 9. Driltech's proposed claim interpretation adds no such elements. Reedrill confuses the requirement that claim terms be interpreted in a manner so as to comport with the claim as a whole with the admonition not to import extraneous structure from the specification into the claim. *See Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 389 (1996) [hereinafter *Markman II*]; *see also Hoganas AB v. Dresser Indus., Inc.*, 9 F.3d 948, 950 (Fed. Cir. 1993). Claim terms may not be interpreted, as advocated by Reedrill, in a manner inconsistent with the patent document. *Markman II*, 517 U.S. at 389.

The '135 patent defines, *inter alia*, two different components. It defines a *retainer* as that component which "is operable to be moved to a position directly *above* the pipe holding arm 92 to prevent longitudinal ejection of a drill pipe section disposed in the storage rack particularly when the mast is in a reclined or substantially horizontal position." App. Record at A00085 (the '135 patent, col. 4,

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[1](...continued)
improper to rely on extrinsic evidence (such as expert testimony) when the intrinsic evidence unambiguously describes the scope of the patented invention. *Vitronics Corp. v. Conceptronic, Inc.*, 90 F.3d 1576, 1583 (Fed. Cir. 1996)." Appellate Rec. at A01216 (footnote omitted). Driltech explained that "[i]ntrinsic evidence includes the patent itself (both the claims and specifications), as well as the prosecution history, if in evidence." *Id.*

ll. 5-9) (emphasis added). The patent defines a *gate* as a separate component which "cooperates with an arcuate recess 100 formed on the [upper] arm to loosely retain the upper end of a drill pipe section, that is to say the gate 96 does not forcibly clamp the pipe section in the gate closed position." *Id.* at col. 3, ll. 64-68. In one place, the patent refers to the gate 96 as retaining gate 96, *id.* at col. 3, ll. 64, but the terms "gate" and "retainer" are never interchanged nor is there any suggestion that the components are interchangeable. They are separately defined, *id.* at col. 3, ll. 59-68 & col. 4, ll. 1-15, separately claimed, *id.* at col. 10, ll. 10-15 & col. 11, ll. 12-14, and refer to distinctly separate elements in the '135 patent, *id.* at A00079 (the '135 patent at Fig. 2, showing separate components gate 96 and retainer 102).

As set forth in the petition at 11-16, when the term "gate" is properly interpreted, no reasonable jury could find such a component, either literally or under the doctrine of equivalents, in any accused Driltech device. When a trial court instructs a jury to use a "plain meaning" for a term that has a limited meaning in the patent, the court either relies on the jury to thoroughly review the patent and its prosecution history to ascertain the proper "plain meaning" interpretation to apply, or the court offers the jury the opportunity to interpret the term in a manner inconsistent with the patent and its prosecution history. Either way, this abrogates the court's responsibility to provide the jury with a claim interpretation. *Markman II*, 517 U.S. at 391. In the latter case, it also conflicts with *Markman II*'s requirement to interpret terms in a manner so as to comport with the patent as a whole. *Id.* at 389. This violation of the Court's precedent in *Markman II* is particularly noteworthy here, where Reedrill asserted a

meaning for a claim term that is inconsistent with the use of that term in the patent document itself.

II. This Court Has Granted Certiorari in Cases Involving Fed. Cir. R. 36 Judgments

Reedrill also argues that as this case was decided by the Federal Circuit under Fed. Cir. R. 36, the pending petition should not be granted. However, this Court has granted certiorari in cases where judgment was entered under Fed. Cir. R. 36. *See Wiggins v. Department of Interior*, 86 F.3d 1179 (Fed. Cir. 1996), *cert. granted*, *King v. Erickson*, 117 S. Ct. 2506 (1997). As in *Wiggins*, the petition for certiorari should be granted.

CONCLUSION

Claim interpretation is a question of law. It is the exclusive province of the court. Where a jury is instructed to use the "plain meaning" for a term that has a particular meaning in the patent, *Markman II* is violated. The violation is particularly noteworthy where, as here, a party asserts a claim interpretation that is inconsistent with

the patent itself. For the reasons set forth in the petition and this reply, the petition should be granted.

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